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HICOM SUZUKI MANUFACTURING MALAYSIA SDN BHD

v.

MAHKAMAH PERUSAHAAN MALAYSIA & ORS

B

HIGH COURT MALAYA, PULAU PINANG
VARGHESE GEORGE VARUGHESE J
[JUDICIAL REVIEW NO: 25-63-2010]
10 OCTOBER 2011

C

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application to quash decision of Industrial Court - Whether Industrial Court committed procedural impropriety - Whether decision on domestic inquiry proper - Different set of charges between 2nd, 4th & 5th respondents as*
D *compared to 3rd respondent - Consolidation of 2nd to 5th respondents' ministerial references by Industrial Court - Whether proper - Whether award only related to domestic inquiries in respect of 2nd, 4th & 5th respondents - Whether Industrial Court should have dealt separately with 3rd respondent's claim*

E

LABOUR LAW: *Industrial Court - Award - Application to High Court to quash decision of Industrial Court - Judicial review - Whether Industrial Court committed procedural impropriety - Whether decision on domestic enquiry proper - Different set of charges between 2nd, 4th &*
F *5th respondents as compared to 3rd respondent - Consolidation of 2nd to 5th respondents' ministerial references by Industrial Court - Whether proper - Whether award only related to domestic inquiries in respect of 2nd, 4th & 5th respondents - Whether Industrial Court should have dealt separately with 3rd respondent's claim*

G

The applicant, by this judicial review proceeding, sought to quash the Industrial Court's Award dated 23 June 2010 ('award') which was in favour of the 2nd to 5th respondents. This award was a common decision in respect of four separate Ministerial references to the Industrial Court under s. 20(3) Industrial Relations Act
H 1967 which involved the 2nd to 5th respondents, respectively. These references had been previously consolidated by the Industrial Court for purposes of hearing and disposal. The applicant was the employer of the 2nd to 5th respondents and the complaint from them was that they had been dismissed without
I just cause and excuse. In all four cases, the applicant conducted respective domestic inquiries and it was found that there had been

misconduct committed by the said respondents. In respect of the 2nd, 4th and 5th respondents, the charges that had been brought against them by the applicant were somewhat identical which arose from the same set of facts. It was alleged that they had sold or were involved in the sale of certain scrap iron belonging to the applicant to an external vendor without the applicant's approval. However, the 3rd respondent was initially charged on a similar count but subsequently, the charge was not proceeded with. Later on, the applicant issued a fresh show-cause letter and subjected the 3rd respondent to another domestic inquiry on a different set of charges ('the second domestic inquiry'). It was based on the finding of misconduct in the second domestic inquiry that the 3rd respondent had been dismissed by the applicant. In this application, the applicant contended that: (i) the Industrial Court failed to give due consideration on the process of the second domestic inquiry and the charges that formed the subject there of; and (ii) the 3rd respondent's dismissal for misconduct, unlike the other respondents, was distinctly based on the finding of the second domestic inquiry. Further, the applicant submitted that the Industrial Court's decision should be quashed on account of: (i) procedural impropriety; (ii) illegality; and (iii) irrationality. The applicant thus prayed for the whole of the award to be quashed or alternatively, if the award in relation to the 3rd respondent was not quashed, it was suggested that it should in the least be remitted back to the Industrial Court for a proper re-hearing. This court, in adjudicating the application, was duty bound to ascertain whether the Industrial Court did in respect of each of the cases first address the issue of whether a proper domestic inquiry had been held, and secondly whether the conclusion reached by the inquiry panel was perverse.

Held (dismissing the applicant's application to quash award in relation to 2nd, 4th and 5th respondents; allowing applicant's application to quash award in relation to 3rd respondent and remitting case back to the Industrial Court):

(1) It is trite that this court, engaged in the exercise of its judicial review jurisdiction, did not sit as an "appellate court". Hence, this court had to be careful not to be drawn away from its supervisory role into an investigation of the merits or justification of the decision arrived at on the basis of finding of facts based on evidence as was properly before the

A Industrial Court. Since domestic inquiry panels had been constituted and inquiries conducted separately by the applicant, the Industrial Court's initial task was to evaluate the validity and propriety of those inquiries and whether the conclusion reached was sustainable (*Bumiputra Commerce Bank*
B *Bhd v. Mahkamah Perusahaan Malaysia & Anor*; refd). (paras 9 & 12)

(2) It was not clear whether the evaluation by the Industrial Court was in respect of the domestic inquiry which involved
C the 2nd, 4th, and 5th respondents only or was it also in respect of the 3rd respondent's second domestic inquiry. The reference in the award to 'domestic inquiry' was in the singular. A reading of the award in its entirety left this court in no doubt that the ruling of the Industrial Court that the
D domestic inquiries conducted by the applicant was tainted or defective was related only to the domestic inquiries in respect to the 2nd, 4th and 5th respondents. (paras 17 & 18)

(3) The finding of the Industrial Court that the domestic inquiries were not conducted properly as alluded in the award, had a
E *fortiorari* to be limited to the domestic inquiries in respect of the 2nd, 4th and 5th respondents. In respect of these three respondents, this court was not persuaded that there was evident of any 'procedural impropriety' on the part of the
F Industrial Court. Hence, the Chairman of the Industrial Court was not in error on fact or in law in embarking on a *de novo* hearing of their claim of unfair dismissal by the applicant. (para 19)

(4) In relation to the 2nd, 4th and 5th respondents, the learned
G Chairman had obviously deliberated and weighed the evidence before him. He did not merely or blankly prefer the respondents' version of events by somewhat even obtained corroboration to the respondents' story from those related to the applicant or was in the know of disposal of scrap iron
H process at the applicant's factory. Further, this was not a case where there was no evidence for the Industrial Court to come to the finding that the said three respondents had been victimised. (paras 22 & 25)

I

(5) There was no irrationally or perversity in the finding reached by the learned Chairman in respect of the complaints of unjustified dismissal by the 2nd, 4th and 5th respondents. Hence, there was no error or justification for this court to interfere and quash that part of the award. (para 25)

(6) The Industrial Court Chairman, in concluding and setting out his reasons for the award got carried away on the sole issue of 'authority to take away and sell' the scrap iron, ie, the issue pertinent to the complaint in respect of the 2nd, 4th and 5th respondents only. Beyond any measure of doubt, the learned Chairman had failed to focus or give sufficient regard to the issues at hand or facts in respect of the 3rd respondent's claim that he had been dismissed without just cause, namely on the charges brought against him in the second domestic inquiry. (para 29)

(7) The Industrial Court Chairman had more likely inadvertently and not intentionally would have departed from his obligation to deal separately with the different situation that the 3rd respondent was subjected to. Hence, there was an incomplete assessment by the Industrial Court on the reference in relation to the 3rd respondent. (para 30)

(8) It would not have been in the interest of justice to both parties to merely quash the award and let the applicant walk scot free. The 3rd respondent was entitled to have his complaint dealt with in a comprehensive and satisfactory manner by the Industrial Court. Further, the 3rd respondent ought not to be denied that right and the applicant should not, on the other hand, derive benefit either from an incomplete Industrial Court process. This court would therefore remit this particular complaint of the 3rd respondent back to the Industrial Court to retry the reference made by the Minister. (para 32)

Case(s) referred to:

Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh [2000] 4 CLJ 77 CA ***(refd)***

Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor [2004] 7 CLJ 77 HC ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 1 CLJ (Rep) 159 SC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

A *Saudi Arabian Airlines v. Shehnaz Mudhatkal & Anor [1999] 81 FLTR 767* ***(refd)***

Sheila Sangar v. Proton Edar Sdn Bhd & Anor [2009] 8 CLJ 200 HC ***(refd)***

Legislation referred to:

B Industrial Relations Act 1967, ss. 20(3), 30(5)

For the plaintiff - M/s Gan Partnership
For the 2nd, 3rd, 4th & 5th respondents - M/s Jessy & Assocs

Reported by Kumitha Abd Majid

C

JUDGMENT

Varghese George Varughese J:

D

[1] The applicant by this judicial review proceeding sought to quash the Award No. 838 of 2010 issued by the Chairman of Industrial Court on 23 June 2010. The award was a common decision in respect of four separate ministerial references to the E Industrial Court under s. 20(3) of the Industrial Relations Act 1967. These references had been previously consolidated by the Industrial Court (Award No. 1247 of 2004) for purposes of hearing and disposal.

F **[2]** The separate references were:

(a) **Case No. 18/4 – 29/07**: Ridzuan Zakaria
(the 2nd respondent/1st claimant)

(b) **Case No. 9/4 – 127/07**: Radhi b Sulong
G (the 3rd respondent/2nd claimant)

(c) **Case No. 9/4 – 411/07**: Md Risman b Sukimen @ Hj Abd Aziz.
(the 4th respondent/3rd claimant)

H (d) **Case No. 18/4 – 687/07**: Roslan b Abu Bakar
(the 5th respondent/4th claimant)

[3] The applicant here (who was the respondent at the Industrial Court) was the employer. The complaint of the 2nd, I 3rd, 4th and 5th respondents was that they had been dismissed by the applicant without 'just cause and excuse'. In all the four

cases, the applicant had conducted respective domestic inquiries and the respective inquiry panels had made findings that there had been 'misconduct' committed by the respondents.

[4] In respect of the 2nd, 4th and 5th respondents the charges that had been brought against them by the applicant were somewhat identical arising from the same set of facts. The allegation against them was that they had sold or were involved in the sale on or about 28 January 2006 of certain 'scrap iron' belonging to the applicant to an external vendor without the approval of the applicant.

[5] However in the case of the 3rd respondent, he had initially been also charged on a similar count and a domestic inquiry had been held on 29 July 2006 (first domestic inquiry). This charge brought against the 3rd respondent was subsequently not proceeded with and dropped on 4 August 2006.

[6] That was not the end of the matter. The applicant then issued a fresh show-cause letter and subjected the 3rd respondent to another domestic inquiry on different set of charges (the second domestic inquiry). The charges this time brought against the 3rd respondent were:

(i) "that you have willfully and knowingly signed a document under the heading "Reply to Letter of Show Cause dated 10 July 2006 claiming involvement and knowledge on a number of issues and allegations (as stated in the letter dated 10 July 2006) when you were actually not."

(ii) "that your act as stated in 1 above not only resulted in the company having to waste money and time in conducting (on) inquiry against you but also suffered undue embarrassment in being told to drop all the charges against you."

(iii) "that you have caused to circulate the said document dated 10 July 2006 to Suzuki Motor Corporation Japan and DRB-Hicom thus causing undue suspicion and putting the repute of the Management in question."

It was based on a finding of 'misconduct' in this second domestic inquiry that the 3rd respondent had been dismissed by the applicant.

[7] The learned Chairman of the Industrial Court in Award No. 838 of 2010, to be fair to him, did properly identify the difference in the charges faced by the 2nd, 4th and 5th respondents, on the one hand and the specific charges against the 3rd respondent (arising from the second domestic inquiry), on the other hand. However upon a perusal of the award I observed that, that distinction seemed to become blurred somewhat, as the learned Chairman proceeded in his award to discuss or deliberate on:

(i) the validity or regularity of the respective domestic enquiries;

(ii) the issues that emerged for determination by the Industrial Court; and

(iii) finally, the findings of the court itself.

[8] This therefore made it necessary for this court in the exercise of its judicial review powers to dichotomise the contents of the common award, from two perspectives namely:

(i) the perspective of the references related to the 2nd, 4th and 5th respondents complaint taken together; and

(ii) the perspective of the reference related to the 3rd respondent's complaint arising from the second inquiry, separately by itself.

The Law

[9] It is trite that this court engaged in the exercise of its judicial review jurisdiction does not sit as an "appellate court". This court had to therefore be careful not to be drawn away from its 'supervisory' role into an investigation of the merits or justification of the decision arrived at on the basis of finding of facts based on evidence as was properly before the tribunal or decision maker, here in this case before the Industrial Court.

[10] In respect of the approach to be taken by this court in such circumstances, I have found the applicable principles to have been neatly summarised by Mohamed Ariff Yusof JC (as he then was) in *Sheila Sangar v. Proton Edar Sdn Bhd & Anor* [2009] 8 CLJ 200, where after reviewing all leading decided authorities on that issue, His Lordship points out that the law on this area was governed by two basic principles. In His Lordship's words:

> (As I have indicated earlier), the first principle in judicial review is that review is concerned with the decision-making process, not the merits substance or justification. The second principle is that there can be an exception to this first principle where the court can examine the substance or justification to satisfy itself that the decision maker has not transgressed the principles of procedural. impropriety, illegality or irrationality (with a possible third principle, "proportionality")

[11] As regards the question whether a decision ought to be interfered with on the grounds of irrationality or for being perverse or so outrageous, I have also found assistance from an observation of the Bombay High Court in *Saudi Arabian Airlines v. Shehnaz Mudhatkal & Anor* [1999] 81 FLTR 767 where the elements of what constitutes a 'perverse decision' is compendiously captured in the following words:

> Perversity in findings can arise only if (a) there is no evidence whatsoever to support the finding, or (b) the conclusions recorded are diametrically contrary to the evidence on record or (c) that the conclusion are such that no reasonable person would have arrived at.

[12] This court had also to bear in mind that since domestic inquiry panels had been constituted and enquiries conducted by the applicant separately in each of these cases, the Industrial Court's initial task as laid out in law was to evaluate the validity and propriety of those enquiries and whether the conclusion reached was sustainable. As have been exposited by Raus Sharif J (as he then was) in *Bumiputera Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor* [2004] 7 CLJ 77):

> ... the Industrial Court should first consider whether or not the domestic enquiry was valid and whether the inquiry notes are accurate.

Elsewhere in that same decision, it has also been noted that:

> ... where due inquiry has been held, the Industrial Court's jurisdiction is limited to considering whether there was a *prima facie* case against the employee.

[13] This court in adjudicating on this judicial review application was also therefore required to ascertain whether the Industrial Court did in respect of each of the cases first "address the issue whether a proper domestic enquiry had been held and whether the conclusion reached by the inquiry panel was perverse".

A For completeness, it has to be also noted here that the Industrial Court was not in any case required to conduct a *de novo* hearing where the Industrial Court was satisfied that a proper due domestic inquiry had been conducted by the employer.

B **The Applicant's Submissions**

[14] The applicant's contention, in summary, was that the decision or findings of the learned Chairman of the Industrial Court should be quashed on account of:

C (i) procedural impropriety;

(ii) illegality; and

(iii) irrationality,

D namely, within the exception to the first principle of law applicable where judicial review powers are exercised, as outlined above.

And, in particular in respect of the 3rd respondent, the complaint before this court was that the Industrial Court had failed to give
E the due consideration required or to focus on the process of the second domestic inquiry and the charges that formed the subject there. The 3rd respondent's dismissal for misconduct (unlike the other respondents) was distinctly based on the finding of this second domestic inquiry.

F The applicant prayed for the whole of the award to be quashed. Alternatively, particularly with reference to the 3rd respondent, if the award in respect of the 3rd respondent was not quashed outright, it was suggested that it should in the least be remitted back to the Industrial Court for a proper rehearing.

G

The Respondents' Submissions

[15] The respondents' however countered that, since the findings of the learned Chairman of Industrial Court were based essentially
H on finding or findings of fact based on the evidence and credibility of witnesses examined by the Industrial Court, such a decision was immunised from judicial review. Issues of fact were for the Industrial Court to decide, and included within this larger principle was another cardinal rule, that the Industrial Court was entitled
I to prefer the evidence of one witness over that of another in arriving at its conclusion. It was not the reviewing court's function

to interfere on the sufficiency of evidence where there was some evidence on the records to support the findings of fact. (*Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77; *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 1 CLJ (Rep) 159)

It was also urged upon this court that there was nothing perverse or unreasonable in the conclusion arrived at by the learned Chairman bearing in mind the Industrial Court had statutorily much latitude in determining such references as the Industrial Court was required "to act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal from". (Section 30(5) of the Industrial Relations Act 1967)

[16] As regards the 3rd respondent and the different nature of charges in his case, (pursuant to which the second domestic inquiry had concluded that there was misconduct which resulted in the dismissal of the 3rd respondent), the submission of counsel for the 3rd respondent was basically that there was sufficient general comments in the award on the issues at hand and even if there was not evident any specific reference to those charges in the award, there was in any case no miscarriage of justice or any error committed by the learned Chairman for the intervention of this court. Alternatively, it was submitted that the records of proceedings at the Industrial Court were before this court and this court could make a ruling or finding of its own, that is, if at all there was some departure or omission by the Industrial Court to focus or address specifically in the award those charges that featured in the second domestic inquiry.

The Court's Evaluation

[17] On the issue of whether the Industrial Court discharged its obligation to properly evaluate the validity of the respective domestic inquiries conducted, the learned Chairman did address this first threshold test incumbent on the Industrial Court with respect to references of this nature. In the award it is recorded as follows:

> The Chairman of the domestic inquiry was called as a witness (COW4) and the domestic inquiry record produced. In this regard, I have perused the records and find it appalling. There is no clear record that a proper investigation was done before the

A commencement of the inquiry. There has been no proper appraisal of the evidence adduced and the finding of guilt against the Claimants is perverse.

However, it was not clear at all to me whether this evaluation by the Industrial Court was in respect of the domestic inquiries involving 2nd, 4th and 5th respondents only or it was also in respect of the 3rd respondent's second domestic inquiry. The reference in the award to 'domestic inquiry' was in the singular too.

C **[18]** The next two sentences following the above quote from the award, were however as follows:

The domestic inquiry did not establish whether the Company had a metal scrap disposal procedure and who had authority to give permission to the employee to sell the scrap. The inquiry panel did not even bother to consider whether the General Manager carried out his duties properly in signing the gate pass.

The latter quoted passage above and a reading of the award in its entirety, left me in no doubt that the ruling of the learned E Chairman of the Industrial Court that the domestic enquiries that were conducted by the applicant was tainted or defective, was related only to the domestic inquiries in respect of the 2nd, 4th and 5th respondents.

F **[19]** Therefore, the finding of the learned Chairman of the Industrial Court that the domestic inquiries were not conducted properly as alluded to in the award, had a *fotiorari* to be limited to the domestic inquiries in respect of the 2nd, 4th and 5th respondents. In respect of these three respondents I was not G persuaded that there was evident any 'procedural impropriety' on the part of the Industrial Court. The learned Chairman was not in error on fact or in law in embarking on a *de novo* hearing of their claim of unfair dismissal by the applicant.

H I therefore could only agree with counsel for the applicant to the limited extent that in respect of the 3rd respondent's reference (the second domestic inquiry), the learned Chairman had not specifically dealt with the validity or otherwise of that domestic inquiry process, as was incumbent on the Industrial Court.

I

The 2nd, 4th And 5th Respondents

[20] Returning then to the substantive conclusion reached by the learned Chairman in respect of the 2nd, 4th and 5th respondents references, the crux of the applicant's complaint before this court was that the learned Chairman's finding that the respondents "... had obtained approval for the sale of the metal scrap and if the company now feels that the General Manager was wrong in signing the gate pass, then the company in allowing the General Manager to go scot free and only punishing the claimants, had victimized the claimants" was based on no evidence and/or was irrational.

[21] The thrust of the applicant's argument was that the learned Chairman had failed to make a distinction between authorisation to 'take out' and permission 'to sell' the scrap iron. It was counsel for the applicant's submission that the learned Chairman was confused or did not address his mind to the difference between approval to take out and approval to sell, which he postulated were significantly different.

[22] The learned Chairman of the Industrial Court was perfectly entitled on the evidence before him, in my assessment, to make the finding that the "gate-pass" issued by the applicant was sufficient to evidence permission or authority to both take out and sell (dispose) the scrap metal. To quote from the award:

> When the gate pass was given to the Company's General Manager for this approval, he should have given it due consideration. Once he had signed the gate-pass, if signified to the Claimants that the metal scrap could be taken out and sold.

The Industrial Court had dutifully evaluated the testimony of the witnesses for the parties and also commented that the words 'FOC' (free of charge) which had been inserted on the gate-pass by a staff of the applicant signified that there was permission to sell the scrap iron taken out. If this was a 'mistake', the applicant had to bear responsibility and the respondents should not now be defaulted for it, further observed the learned Chairman in the award.

The evidence before the learned Chairman that led to this conclusion even included a concession by the applicant's General Manager to the effect that:

> I agree that looking at the gate pass today-means it was free of charge.

Further the applicant's ex-Plant Manager had also in evidence stated as follows:

> My understanding of the gate pass is that it authorized the Claimant to take out the metal scrap free of charge. Scrap metal could be given on FOC basis. The General Manager has authority to give the scrap on FOC basis. He had discretion on the matter. Once the scrap is authorized to be taken out of the factory, the Company no longer has any property in it. The Claimants can sell it.

The learned Chairman had obviously deliberated and weighed the evidence before him. The learned Chairman did not merely or blankly prefer the respondents' version of events but somewhat even obtained corroboration to the respondents' story from those related to the applicant or was in the know of disposal of scrap iron process at the applicant's factory.

[23] The distinction argued by counsel for respondent was in my view, a very artificial one. Further it could not be ignored that the gate-pass (the authority to take out, conceded by the applicant) as a matter of fact did not stipulate what is to be done to the scrap iron that was permitted to be taken out of the applicant's premises.

If it was not to be sold or disposed of at the instance of those authorised to take it out, then it would have been reasonable for the applicant to have so expressly specified or qualified to whom it should be delivered or where it was to be stored.

[24] On the issue then whether the learned Chairman had taken into consideration irrelevant consideration, it was the applicant's contention that the learned Chairman was influenced in coming to his conclusion by the 'minimal value' of the scrap iron that was taken out of the applicant's premises.

This line of attack mounted by the applicant, appears to have arisen from the following observation in the award:

> The Claimants have all been long serving employees of the company and has been stated by the senior most Claimant (Risman) that without the approval, the Claimants would not have embarked on this unfortunate venture, which in itself had little value (RM2,095.00) but they had to pay a very heavy price for it, in spite of the fact that the money had been returned to the Company.

In my assessment, that statement by the learned Chairman in the award that the scrap iron was of minimal value (or for that matter, the money has been returned to the company) were merely a passing comment and did not form (by any logical argument) the determinative factor or reason for the conclusion reached by the learned Chairman. This was obvious from the passage itself, and it does not help one's case to take such statements in isolation or out of context. Should the passage be read in its complete form and, more significantly, the award itself was taken into consideration in toto, there was no reason for any doubt that a major portion of the award contained the learned Chairman's deliberations on the critical issue that arose, namely, the 'authority to take out and sell' that is, in so far as the complaints/references of the 2nd, 4th and 5th respondents that they had been dismissed without just cause and thereby victimised was concerned. I therefore found no merit to the applicants further allegation that irrelevant consideration had played a major role in the learned Chairman's conclusion. There was no illegality committed by the learned Chairman in this respects.

[25] I hold that that this was not a case where there was no evidence for the Industrial Court to come to that finding that the 2nd, 4th and 5th respondents had been victimised. I found that the learned Chairman had asked the right questions and had come to the right conclusions on the evidence before him and not on any extraneous matter. The conclusion was not outrageous or unreasonable. There was therefore no irrationality or perversity in the finding reached by the learned Chairman in respect of the complaints of unjustified dismissal by the 2nd, 4th and 5th respondents. There was therefore no error or justification for this court to interfere and quash that part of the award.

The 3rd Respondent

[26] Now in respect of the 3rd respondent and specifically the charges brought against him in the second domestic inquiry, I had found earlier that the learned Chairman was in error in not addressing firstly as to the validity or propriety of that second domestic inquiry process itself which was an expected prerequisite to be satisfied by the Industrial Court on the authorities in this area of the law.

I had further gone through the deliberations of the learned Chairman set out in the award. Apart from statements as to how the second domestic enquiry came about against the 3rd respondent (under the heading 'Brief Facts') and a recital of the specific charges faced by the 3rd respondent in this second domestic inquiry (under the heading 'whether the claimants are guilty of misconduct'), I found absolutely no discussion at all by the learned Chairman in the award as to those 'charges' which arose from a different set of facts, namely, the contents of the 3rd respondent's reply (10 July 2006) to a show cause letter issued by his employer. This was a glaring misdirection and following from that, the subsequent finding in the award, in so far as it encompassed the 3rd respondent's dismissal, and the award of compensation made in favour of the 3rd respondent, could not obviously be sustained.

[27] In that circumstances, what then was the course of action that this court sitting in judicial review of the award to take? As adverted to above, the applicant had submitted that the award in so far as it related to the 3rd respondent should as a consequence be quashed outright. Counsel for the respondents position on the other hand was that this court could, taking into consideration all the material that was placed before it, substitute this court's own decision in place of the learned Chairman's decision. To this argument the applicant's retort was that there had been no or any primary 'adjudication' by the Industrial Court of the issues in the first place, for this court to substitute its own decision for that of the learned Chairman (on the basis of the decision in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147). It was therefore submitted for the applicant that, if the terms of the award in so far as it related to the 3rd respondent was not quashed, then that part of the award at the least should be 'set aside' and the 3rd respondent's reference by the Minister as a whole be remitted back for a rehearing before the Industrial Court.

[28] I had then requested both counsels to highlight to me all relevant parts of material available to me on the records in the matter for me to consider their respective submissions and I was grateful to counsel for their further assistance in this respect. I was convinced that I could only substitute my own findings/ conclusion for that of the learned Chairman if there was relevant

material in the respective testimony and submissions (relating to second domestic inquiry and the charges thereto related) sufficient for a determination by this court on those issues involved.

There were two issues that, I sitting in review, had to contend with, namely:

(a) I had to confirm whether there was any adjudication at all by the learned Chairman made on the substantive issue of wrongful dismissal of the 3rd respondent; and

(b) whether there was sufficient material on the records before me (testimony of witnesses and submissions at the Industrial Court) to make a decision in any case on the 3rd respondent claim of unfair dismissal pursuant to the second domestic inquiry.

[29] Having then taken into consideration those material from the records highlighted to me by respective counsel for the parties, my assessment was that, the learned Chairman had in coming to his conclusion and in setting out his reasons for the award, got carried away on the sole issue of 'authority to take away and sell' the scrap iron (ie, the issue pertinent to the complaint in respect of the 2nd, 4th and 5th respondents only). Beyond any measure of doubt, the learned Chairman had failed to focus or give sufficient regard to the issues at hand or facts or relevant circumstances in respect of the 3rd respondent's claim that he had been dismissed without just cause, namely on the charges brought against the 3rd respondent in the second domestic inquiry. Firstly therefore, there was no evaluation or adjudication by the learned Chairman at all on this core issues related to the 3rd respondent's reference.

[30] It was my conclusion, as it would appear from the words of the award taken as a whole that, the learned Chairman had more likely inadvertently and not intentionally, departed from his obligation to deal with separately with the different situation that the 3rd respondent was subjected to. In the result, what we had here, in my view, was an incomplete assessment by the Industrial Court of the reference in respect of the 3rd respondent.

[31] Secondly, I further found, that such of the material on the record as had been highlighted to me by respective counsel, was in any event, insufficient as regards the facts in issue for me to form any conclusion of my own on the complaint of the 3rd

A respondent, that is even if I was entitled to do so. I was also mindful that this court should be slow to usurp the functions statutorily vested in the Industrial Court to deal with references from the Minister on a complaint by an employee of dismissal without just cause and excuse.

B

[32] Following from the above, it would not have been in the interest of justice to both parties to merely quash outright the award and let the applicant scot free. The 3rd respondent was entitled to have his complaint dealt with in a comprehensive and
C satisfactory manner by the Industrial Court. The 3rd respondent ought not to be denied that right and the applicant should not on the other hand derive benefit either, from an incomplete Industrial Court process.

D There was no issue between the parties that this court had the power to remit this particular complaint back to the Industrial Court to retry the reference made by the Minister in respect of the complaint of the 3rd respondent.

[33] Accordingly, my orders having had given all submission made
E to this court the most anxious consideration, were as follows:

(a) The applicant's application to quash the Industrial Court Award No. 838 of 2010 in so for as it determined the complaints of the 2nd, 4th and 5th respondents (Case No:
F 18/4 - 29/07; Case No: 9/4 - 411/07; Case No. 18/4 - 687/07) is dismissed.

(b) The applicant's application to quash the Industrial Court Award No. 838 of 2010 in so far as it purported to have determined the complaint of the 3rd respondent (Case No.
G 9/4 - 127/07) is allowed and it is further ordered that Case No. 9/4 - 127/07 be remitted back to the Industrial Court to be retried before another Chairman separately.

(c) Each party is to bear their own costs in the circumstances of
H the orders above.

I